



[4910-EX-P]

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 385

[Docket No. FMCSA-2019-0068]

RIN 2126-AC28

Incorporation by Reference; North American Standard Out-of-Service Criteria; Hazardous Materials Safety Permits

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Final rule.

SUMMARY: FMCSA amends its Hazardous Materials Safety Permit regulations to incorporate by reference the April 1, 2019, edition of the Commercial Vehicle Safety Alliance’s (CVSA) “North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive Materials as defined in 49 CFR Part 173.403.” The Out-of-Service Criteria provide uniform enforcement tolerances for roadside inspections to enforcement personnel nationwide, including FMCSA’s State partners.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Petitions for Reconsideration of this final rule must be submitted to the FMCSA Administrator no later than [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. Michael Huntley, Chief, Vehicle and Roadside Operations Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001, (202) -366-9209. If you have questions on viewing or submitting material to the docket, contact Docket Operations, (202) 366-9826.

SUPPLEMENTARY INFORMATION:

Rulemaking Documents

For access to docket FMCSA-2019-0068 to read background documents and comments received, go to <http://www.regulations.gov> at any time, or to Docket Operations at U.S. Department of Transportation, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

II. Executive Summary

This rulemaking updates an incorporation by reference found at 49 CFR 385.4(b)(1) and referenced at 49 CFR 385.415(b). Section 385.4(b)(1) currently references the April 1, 2018, edition of CVSA's "North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive Materials as defined in 49 CFR Part 173.403." The Out-of-Service Criteria, while not regulations, provide uniform enforcement tolerances

for roadside inspections to enforcement personnel nationwide, including FMCSA's State partners. In this final rule, FMCSA incorporates by reference the April 1, 2019, edition.

Thirteen updates distinguish the April 1, 2019, handbook edition from the 2018 edition. The updates are all described in detail in the October 2, 2019 notice of proposed rulemaking (NPRM) for this rule (85 FR at 52434-36). The incorporation by reference of the 2019 edition does not impose new regulatory requirements.

III. Legal Basis for the Rulemaking

Congress has enacted several statutory provisions to ensure the safe transportation of hazardous materials in interstate commerce. Specifically, in provisions codified at 49 U.S.C. 5105(d), relating to inspections of motor vehicles carrying certain hazardous material, and 49 U.S.C. 5109, relating to motor carrier safety permits, the Secretary of Transportation is required to promulgate regulations as part of a comprehensive safety program on hazardous materials safety permits. The FMCSA Administrator has been delegated authority under 49 CFR 1.87(d)(2) to carry out the rulemaking functions vested in the Secretary of Transportation. Consistent with that authority, FMCSA has promulgated regulations to address the congressional mandate on hazardous materials. Those regulations on hazardous materials are the underlying provisions to which the material incorporated by reference discussed in this final rule is applicable.

IV. Background

In 1986, the U.S. Department of Energy and CVSA entered into a cooperative agreement to develop a higher level of inspection procedures, out-of-service conditions and/or criteria, an inspection decal, and a training and certification program for inspectors to conduct inspections on shipments of transuranic waste and highway route controlled

quantities of radioactive material. CVSA developed the North American Standard Level VI Inspection Program for Transuranic Waste and Highway Route Controlled Quantities of Radioactive Material. This inspection program for select radiological shipments includes inspection procedures, enhancements to the North American Standard Level I Inspection, radiological surveys, CVSA Level VI decal requirements, and the “North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive Materials as defined in 49 CFR Part 173.403.” As of January 1, 2005, all vehicles and carriers transporting highway route controlled quantities of radioactive material are regulated by the U.S. Department of Transportation. All highway route controlled quantities of radioactive material must pass the North American Standard Level VI Inspection prior to the shipment being allowed to travel in the U.S. All highway route controlled quantities of radioactive material shipments entering the U.S. must also pass the North American Standard Level VI Inspection either at the shipment’s point of origin or when the shipment enters the U.S.

Section 385.415 of title 49, Code of Federal Regulations, prescribes operational requirements for motor carriers transporting hazardous materials for which a hazardous materials safety permit is required. Section 385.415(b) requires that motor carriers must ensure a pre-trip inspection is performed on each motor vehicle to be used to transport a highway route controlled quantity of a Class 7 (radioactive) material, in accordance with the requirements of CVSA’s “North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway

Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive Materials as defined in 49 CFR Part 173.403.”

According to 2012-2017 data from FMCSA’s Motor Carrier Management Information System (MCMIS), approximately 3.5 million Level I – Level VI roadside inspections were performed annually. Nearly 97 percent of these were Level I,¹ Level II,² and Level III³ inspections. During the same period, an average of 842 Level VI inspections were performed annually, comprising only 0.024 percent of all roadside inspections. On average, out-of-service violations were cited in only 10 Level VI inspections annually (1.19 percent), whereas on average, out-of-service violations were cited in 269,024 Level I inspections (25.3 percent), 266,122 Level II inspections (22.2 percent), and 66,489 Level III inspections (6.2 percent) annually. Based on these statistics, CMVs transporting transuranics and highway route controlled quantities of radioactive materials are clearly among the best maintained and safest CMVs on the highways today, due largely to the enhanced oversight and inspection of these vehicles because of the sensitive nature of the cargo being transported.

V. Notice of Proposed Rulemaking

FMCSA published an NPRM on October 2, 2019 (84 FR 52432). Whereas the incorporation by reference found at 49 CFR 385.4(b)(1) and referenced at 49 CFR 385.415(b) concerns the April 1, 2018, edition of CVSA’s “North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria

¹ Level I is a 37-step inspection procedure that involves examination of the motor carrier’s and driver’s credentials, record of duty status, the mechanical condition of the vehicle, and any hazardous materials/dangerous goods that may be present.

² Level II is a driver and walk-around vehicle inspection, involving the inspection of items that can be checked without physically getting under the vehicle.

³ Level III is a driver-only inspection that includes examination of the driver’s credentials and documents.

for Commercial Highway Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive Materials as defined in 49 CFR Part 173.403,” the NPRM proposed to incorporate by reference the April 1, 2019, edition.

The 2019 edition identifies (1) driver-related violations of the FMCSRs that are so severe as to warrant placing the CMV driver out of service, (2) vehicle equipment-related violations of the FMCSRs that are so severe as to warrant placing the CMV out of service, and (3) unsafe conditions in the transportation of hazardous materials. The purpose of the publication is to provide inspection criteria for Federal and State motor carrier safety enforcement personnel to promote uniform and consistent inspection procedures of CMVs operated in commerce.

Thirteen updates distinguish the April 1, 2019, handbook edition from the 2018 edition. The updates are all described in detail in the NPRM (85 FR at 52434-36). The incorporation by reference of the 2019 edition does not impose new regulatory requirements.

VI. Discussion of Comments Received on the Proposed Rule

FMCSA received one comment to the NPRM. CVSA commended FMCSA for publishing the NPRM, and encouraged FMCSA to finalize the rule and update the incorporation by reference because “the current reference of the April 1, 2018 edition is outdated and does not reflect the most up to date standard which was published on April 1, 2019.” In addition, CVSA stated that the handbook is reviewed and updated annually, and noted “that a new edition will be published on April 1, 2020, and encourages the agency to take the necessary actions to update the regulations accordingly at that time.”

VII. Section-by-Section Analysis

FMCSA revises 385.4(b)(1) to update the reference from the April 1, 2018, edition to the April 1, 2019, edition of the “North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive Materials as defined in 49 CFR Part 173.403.”

VIII. International Impacts

The FMCSRs, and any exceptions to the FMCSRs, apply only within the United States (and, in some cases, United States territories). Motor carriers and drivers are subject to the laws and regulations of the countries in which they operate, unless an international agreement states otherwise. Drivers and carriers should be aware of the regulatory differences among nations.

The CVSA is an organization representing Federal, State, and Provincial motor carrier safety enforcement agencies in United States, Canada, and Mexico. The Out-of-Service Criteria provide uniform enforcement tolerances for roadside inspections conducted in all three countries.

IX. Regulatory Analyses

A. E.O. 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

FMCSA has determined that this action is not a significant regulatory action under section 3(f) of E.O. 12866, Regulatory Planning and Review, as supplemented by E.O. 13563 (76 FR 3821, January 21, 2011), Improving Regulation and Regulatory Review. In addition, this rule is not significant within the meaning of DOT regulations

(84 FR 71714, December 27, 2019). The Office of Management and Budget (OMB) did not, therefore, review this document.

B. E.O. 13771 Reducing Regulation and Controlling Regulatory Costs

E.O. 13771, “Reducing Regulation and Controlling Regulatory Costs,” does not apply to this action because it is a nonsignificant regulatory action, as defined in section 3(f) of E.O. 12866, and has zero costs; therefore, it is not subject to the “2 for 1” and budgeting requirements.

C. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801, et seq.), the Office of Information and Regulatory Affairs designated this rule as not a “major rule,” as defined by 5 U.S.C. 804(2).⁴

D. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), Pub. L. 96-354, 94 Stat. 864 (1980), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (5 U.S.C. 601 et seq.), requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term “small entities” comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than

⁴ A “major rule” means any rule that the Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget finds has resulted in or is likely to result in (a) an annual effect on the economy of \$100 million or more; (b) a major increase in costs or prices for consumers, individual industries, Federal agencies, State agencies, local government agencies, or geographic regions; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets (5 U.S.C. 804(2)).

50,000.⁵ In compliance with the RFA, FMCSA evaluated the effects of the rule on small entities. The rule incorporates by reference the April 1, 2019, edition of CVSA’s “North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive Materials as defined in 49 CFR Part 173.403.” DOT policy requires an analysis of the impact of all regulations on small entities, and mandates that agencies strive to lessen any adverse effects on these entities.

When an Agency issues a rulemaking proposal, the RFA requires the Agency to “prepare and make available an initial regulatory flexibility analysis” that will describe the impact of the proposed rule on small entities (5 U.S.C 603(a)). Section 605 of the RFA allows an agency to certify a rule, instead of preparing an analysis, if the final rule is not expected to impact a substantial number of small entities. The final rule is largely editorial and provides guidance to inspectors and motor carriers transporting transuranics in interstate commerce. Accordingly, I hereby certify that this final rule will not have a significant economic impact on a substantial number of small entities.

E. Assistance for Small Entities

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, FMCSA wants to assist small entities in understanding this rule so that they can better evaluate its effects. If the rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions, please consult the FMCSA point of contact, Michael Huntley, listed in the **FOR FURTHER INFORMATION CONTACT** section of this rule.

⁵ 5 U.S.C. 601.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the Small Business Administration's Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1-888-REG-FAIR (1-888-734-3247). DOT has a policy regarding the rights of small entities to regulatory enforcement fairness and an explicit policy against retaliation for exercising these rights.⁶

F. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. The Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector, of \$165 million (which is the value equivalent to \$100,000,000 in 1995, adjusted for inflation to 2018 levels) or more in any one year. This final rule will not result in such an expenditure.

G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), Federal agencies must obtain approval from the OMB for each collection of information they conduct, sponsor, or require through regulations. FMCSA determined that no new information collection requirements are associated with this final rule.

H. E.O. 13132 (Federalism)

⁶ U.S. Department of Transportation (DOT). "The Rights of Small Entities to Enforcement Fairness and Policy Against Retaliation." Available at: <https://www.transportation.gov/sites/dot.gov/files/docs/SBREFAnotice2.pdf> (accessed April 20, 2018).

A rule has implications for federalism under section 1(a) of Executive Order 13132 if it has “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” FMCSA has determined that this rule will not have substantial direct costs on or for States, nor will it limit the policymaking discretion of States. Nothing in this document preempts any State law or regulation. Therefore, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Impact Statement.

I. Privacy Impact Assessment

Section 522 of title I of division H of the Consolidated Appropriations Act, 2005, enacted December 8, 2004 (Pub. L. 108-447, 118 Stat. 2809, 3268, 5 U.S.C. 552a note), requires the Agency to conduct a privacy impact assessment (PIA) of a regulation that will affect the privacy of individuals. This rule does not require the collection of personally identifiable information (PII) and will not affect the privacy of individuals.

J. E.O. 13175 (Indian Tribal Governments)

This final rule does not have Tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

K. National Technology Transfer and Advancement Act (Technical Standards) and 1 CFR Part 51

The National Technology Transfer and Advancement Act (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) are standards that are developed or adopted by voluntary consensus standards bodies. FMCSA does not intend to adopt its own technical standard, thus there is no need to submit a separate statement to OMB on this matter. The standard being incorporated in this final rule is discussed in sections IV, V, and VII above, and is reasonably available at FMCSA and through the CVSA website.

L. Environment (NEPA)

FMCSA analyzed this rule consistent with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and determined this action is categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1 (69 FR 9680, March 1, 2004), Appendix 2, paragraphs (6)(b) and (6)(t)(2). The Categorical Exclusion (CE) in paragraph (6)(b) covers regulations which are editorial or procedural, including technical or other minor amendments to existing FMCSA regulations, while the CE in paragraph (6)(t)(2) includes regulations to ensure that the States comply with the provisions of the Commercial Motor Vehicle Safety Act of 1986. The content in this rule is covered by these CEs, there are no extraordinary circumstances present, and the final action does not have any effect on the quality of the environment.

M. E.O. 13783 (Promoting Energy Independence and Economic Growth)

E.O. 13783 directs executive departments and agencies to review existing regulations that potentially burden the development or use of domestically produced energy resources, and to appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources. In accordance with E.O. 13783, DOT prepared and submitted a report to the Director of OMB that provides specific recommendations that, to the extent permitted by law, could alleviate or eliminate aspects of agency action that burden domestic energy production. This rule has not been identified by DOT under E.O. 13783 as potentially alleviating unnecessary burdens on domestic energy production.

List of Subjects in 49 CFR Part 385

Administrative practice and procedure, Highway safety, Incorporation by reference, Mexico, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

In consideration of the foregoing, FMCSA amends 49 CFR part 385 as set forth below:

PART 385--SAFETY FITNESS PROCEDURES

1. The authority citation for part 385 is revised to read as follows:

Authority: 49 U.S.C. 113, 504, 521(b), 5105(d), 5109, 5113 13901-13905, 13908, 31135, 31136, 31144, 31148, and 31502; Sec. 113(a), Pub. L. 103-311; Sec. 408, Pub. L. 104-88, 109 Stat. 803, 958; Sec. 350 of Pub. L. 107-87, 115 Stat. 833, 864; and 49 CFR 1.87.

2. Amend § 385.4:

- a. In paragraph (a), by removing the words “call (202) 741-6030” and adding in their place “email fedreg.legal@nara.gov”; and

b. By revising paragraph (b)(1).

The revision reads as follows:

§ 385.4 Matter incorporated by reference.

* * * * *

(b) * * *

(1) “North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive Materials as defined in 49 CFR Part 173.403,” April 1, 2019, incorporation by reference approved for § 385.415(b).

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Issued under authority delegated in 49 CFR 1.87.

Dated: February 11, 2020.

Jim Mullen
Acting Administrator

[FR Doc. 2020-03129 Filed: 2/21/2020 8:45 am; Publication Date: 2/24/2020]